PD-0870-18
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 4/19/2019 5:52 PM
Accepted 4/25/2019 9:27 AM
DEANA WILLIAMSON
CLERK

No. PD-0870-18

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
4/25/2019
DEANA WILLIAMSON, CLERK

JAMES E. WILLIAMS,
APPELLANT

V.

THE STATE OF TEXAS,
APPELLEE

On the Granting of a Petition for Discretionary Review from an Opinion of the Fort Worth Court of Appeals in Cause Number 02-17-00001-CR, in an Appeal from the 297th Judicial District Court No. 1469951R, the Honorable David Hagerman, Presiding

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APPELLANT'S REPLY BRIEF ON THE MERITS

COLIN T. MCLAUGHLIN
McLaughlin Law, PLLC
State Bar of Texas No. 24060892
6513 Colleyville Blvd, Suite 300
Colleyville, TX 76034
Tel: (817) 482-6263
Fax: (817) 329-7732
colintmclaughlin@gmail.com
Counsel for James E. Williams

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STATEMENT OF THE CASE

Appellant was indicted for aggravated kidnapping. CR 7. He pled not guilty. RR III – 8. A Tarrant County jury found Appellant guilty of the lesser offense of attempted kidnapping. RR IX - 6. The jury assessed a sentence of two years in a state jail facility. CR 258. Judgment was rendered on October 6, 2016. CR 261. The trial court's judgment contained a finding that Appellant was not required to register as a sex offender and did not give Appellant any credit for time that he had already served in jail. CR 261.

On October 13, Appellant filed a motion for a new trial at punishment and a motion in arrest of judgment – this was based on an argument that he was entitled to credit for time already served in jail. CR 266. On October 24, Appellant filed a verified motion for new trial, this time attaching a business records affidavit from the Tarrant County Sheriff's Office documenting his time-credit claim. CR 278. Also on October 24, Appellant filed a motion for judgment nunc pro tunc, essentially raising the same time-credit argument. CR 290.

The following day, October 25, the trial court issued its first nunc pro tunc order, requiring Appellant to register as a sex offender. CR 298. As part of that order, the clerk was directed to attach a copy of the nunc pro tunc order to the original judgment. CR 298.

On October 28, the trial court signed a second nunc pro tunc order reciting that Appellant should receive time credit. CR 314. Again, the clerk was directed to attach this order to the original judgment. CR 315.

Meanwhile, Appellant's motions for new trial and arrest of judgment were deemed denied, and he filed a notice of appeal on December 16. CR 317.

On appeal, Appellant complained about the first nunc pro tunc order – both that entering the sex registration requirement was not clerical and that it had been done without giving him proper notice. The State, in its reply brief, argued that the Fort Worth Court of Appeals was without jurisdiction to hear the case. Specifically, the State claimed that Appellant had failed to give a timely notice of appeal to the first nunc pro tunc (that is, within thirty days of the order's issuance).

A panel of the Fort Worth Court disagreed with the State and reached the merits of Appellant's claims. *Williams v. State*, No. 02-17-00001-CR, 2018 WL 3468458 at *3-4 (Tex. App.—Fort Worth July 19, 2018, pet. granted) (unpublished). However, that panel also overruled Appellant's points of error and affirmed his conviction. *Id*. at *4-5. Justice Pittman dissented and concurred, arguing that because a nunc pro tunc is an appealable order, Appellant should have filed his notice of appeal within thirty days of its issuance. *Id*. at *5-6 (Pittman, J., dissenting and concurring). The State filed a petition for review arguing that Appellant's appeal

should have been dismissed for want of jurisdiction. This Court granted the State's PDR on January 9, 2019.

ISSUE PRESENTED

Appellant was not required to file a notice of appeal from the first nunc pro tunc order because there could have been no appeal from that order. As the nunc pro tunc was entered while the trial court retained plenary power, the order was interlocutory – and, therefore, unappealable.

STATEMENT OF FACTS

Appellant was found guilty of the attempted kidnapping of a girl (younger than fourteen) who was walking home from school. As this appeal concerns purely legal issues, the pertinent procedural history is contained in Appellant's Statement of the Case, *supra*.

SUMMARY OF THE ARGUMENT

Generally, a defendant may appeal an order nunc pro tunc. That's because it's a final order – such orders are appealable. However, when a nunc pro tunc order is handed down while the trial court retains plenary power and jurisdiction over the case, it is most assuredly not a final order. It is, therefore, interlocutory, and its appealability can be conferred only by express authority.

Appellant timely filed a motion for new trial. Accordingly, the trial court's nunc pro tunc order which came during the pendency of the new trial motion could not have constituted a final, appealable order. Therefore, Appellant was not required to file a separate notice of appeal from that order, and the Court of Appeals correctly reached the merits of his appeal – based on his notice of appeal from the judgment.

ARGUMENT AND AUTHORITIES

The State faults Appellant for failing to file a *separate* notice of appeal to an order from the trial court that was issued while motion for new trial was pending. (Appellant of course filed a notice of appeal challenging the judgment of the trial court). First, there is no legal authority that would even allow an appeal from this interlocutory order. Thus, Appellant cannot be blamed for failing to file a notice of appeal from that order. Second, this Court should decline the State's invitation to upend established law and impose a silly and meaningless burden on defendants.

The Court of Appeals' Opinion:

The Fort Worth Court's analysis of Appellant's jurisdictional issue begins as it should – with the jurisdictional rule. First, the Court relied on the plain language of appellate rule 26.2, finding that a notice of appeal must be filed:

> (1) within 30 days after the day sentence is imposed or suspended in open court, or after the day the trial court enters an appealable order; or
> (2) within 90 days after the day sentence is imposed or suspended in open court if the defendant timely file a motion for new trial.
>
> TEX. R. APP. P. 26.2(a).

See Williams, 2018 WL 3468458 at *3. Given this, the Court held that because Appellant filed a motion for new trial, his notice of appeal was due 90 days after the

trial court imposed sentence in open court. And therefore Appellant's notice of appeal from the trial court's judgment was timely. *Id*.

Further, the Fort Worth Court considered that, "Nunc pro tunc orders or judgments generally are reserved for actions taken outside a trial court's plenary power, requiring a trial court to rely on its inherent authority to make the record reflect what previously and actually occurred during its plenary power." *Id*. at 4. Because the trial court still retained plenary power when it purported to enter its nunc pro tunc orders, those orders were really just modifications of its judgment. *Id*. Therefore, the general principle of Rule 26.2(a)(2) still applied and Appellant could raise his complaints via his timely filed notice of appeal. *Id*.

Appellant was not bound to file a notice of appeal from an interlocutory order:

The cases from this Court construing when a trial court may correct a clerical error in its judgment have not exactly been a model of clarity. *Compare Perkins v. State*, 505 S.W.2d 563, 564 (Tex. Crim. App. 1974) ("At the time of the nune pro tunc hearing, the appellate record had not been filed in this court and the trial court still had jurisdiction of the case under the provisions of Article 40.09, Vernon's Ann.C.C.P., and had the authority to enter the nunc pro tunc order.") *with State v. Bates*, 889 S.W.2d 306, 309 (Tex. Crim. App. 1994) ("Rule 36 [now, Rule 23] vests a trial court with the authority to correct mistakes or errors in a judgment or order

after the expiration of the court's plenary power, via entry of a judgment nunc pro tunc."). The Court of Appeals has, perhaps sensibly, relied on the more recent of these cases to find that a trial court may correct an order via a nunc pro tunc only after "the trial court's plenary power to determine the case has expired." *Williams*, 2018 WL 3468458 at *4. The State, for its part, argues that a trial court has inherent authority to issue a nunc pro tunc order any time it likes. *See* State's brief at 18-21.

Appellant's response rests on neither of these foundations. Simply put, whether or not a nunc pro tunc is an available option for a trial court prior to the expiration of its jurisdiction, a judgment modification made during the pendency of a motion for new trial is not an *appealable* order – in the sense that the State now demands. The reason is simple: a nunc pro tunc order rendered before a judgment is final is merely interlocutory.

"Interlocutory" is generally defined as follows: "Provisional; interim; temporary; not final. Something intervening between the commencement and the end of a suit which decides some point or matter, but is not a final decision of the whole controversy." *Interlocutory*, Black's Law Dictionary (5th Ed. 1979). Undoubtedly, the trial court's first nunc pro tunc order could not have been a "final decision." Neither the language of the nunc pro tunc order nor the circumstances of its entry demonstrate that it was intended to resolve "the whole controversy" which originated from Appellant's criminal case. Even the State does not dispute that the

trial court retained plenary power – particularly where, such as here, there was a pending motion for new trial. Because the trial court's nunc pro tunc order by itself could not function as a final judgment in Appellant's case, it perfectly fits the definition of an interlocutory order.

Interlocutory orders are not, however, appealable without specific legal authorization. *See Apolinar v. State*, 820 S.W.2d 792, 794 (Tex. Crim. App. 1991) ("The courts of appeals do not have jurisdiction to review interlocutory orders unless that jurisdiction has been expressly granted by law."). This general proscription against interlocutory appeals has a long history in Texas. *See, e.g., Williams v. State*, 464 S.W.2d 842, 844 (Tex. Crim. App. 1971) (trial court's refusal to dismiss on account of speedy trial denial not immediately appealable); *Ex parte Conner*, 439 S.W.2d 350, 350 (Tex. Crim. App. 1969) (characterizing appeal of pretrial ruling as one seeking a "declaratory judgment," which Court would not be authorized to enter); *Ex parte Smith*, 215 S.W. 299, 299 (Tex. Crim. App. 1919) ("A refusal to grant a writ of habeas corpus is not a final judgment, and will not support an appeal."); *Yarbrough v. The State*, 2 Tex. 519, 1847 WL 3603 at *6 (Tex. 1847) ("If, then, the present be not a final judgment, being in a criminal case, the constitution itself excludes the right of appeal by clear and necessary implication."). Additionally, the fact that this order came after the trial court's oral rendition of a judgment and sentence should have no effect on its interlocutory nature. *See Haile*

v. State, 451 S.W.3d 856, 858 (Tex. App.—Austin 2014, no pet.) (no appellate jurisdiction to entertain appeal of post judgment ruling on motion to dismiss costs and fines).

Is this interlocutory order one that may be appealed? The State seems to think so, relying primarily on this Court's opinion in *Blanton v. State*, 369 S.W.3d 894 (Tex. Crim. App. 2012). *Blanton* of course stands for the proposition that, generally speaking, a court's nunc pro tunc order may be appealed. *See id*. at 903-04. However, neither in *Blanton* nor any of the authorities it relied on did a defendant successfully appeal a nunc pro tunc order that was entered while the trial court retained plenary jurisdiction. *Id*. at 93. Similarly, with two exceptions, the cases cited by the State are all situations in which a nunc pro tunc order has been entered after the underlying judgment has become final – in some cases, quite a long time after the judgment becomes final.

The two exceptions are interesting because they stand for the opposite of the proposition the State has argued. Both *Resnick v. State*, 574 S.W.2d 558, 560 (Tex. Crim. App. 1978) and *Perkins*, 505 S.W.2d at 564 are cases in which this Court held it was proper for a trial court to correct the judgment *before* it had arguably lost jurisdiction. However, in both cases, the defendants appealed not from the nunc pro tunc order itself but from the underlying conviction. *See Resnick*, 574 S.W.2d at 558; *Perkins*, 505 S.W.2d at 563. And even then, both defendants were allowed, as it

were, to challenge the underlying nunc pro tunc on direct appeal of their convictions. It would not have even occurred to this Court that either Resnick or Perkins would have had to file two notices of appeal to make complaints about (1) the conviction itself and (2) any nunc pro tunc orders which took place while the trial court still held plenary power.[1] Both *Resnick* and *Perkins* appear to be completely reasonable and unremarkable appeals from two convictions – both of which happen to have nunc pro tunc issues.

Neither is there any statutory or rule-based authority that would permit an appeal from a plenary stage nunc pro tunc (again, as opposed to an appeal from an underlying conviction[2]). As this Court has pointed out, "Rule 23.1 is the current rule regarding *nunc pro tunc* judgments." *Blanton*, 369 S.W.3d at 898. Rule 23.1 simply states: "Unless the trial court has granted a new trial or arrested the judgment, or unless the defendant has appealed, a failure to render judgment and pronounce sentence may be corrected at any time by the court's doing so." TEX. R. APP. P. 23.1. There would appear to be, therefore, no explicit statutory authority for appealing a nunc pro tunc order that was interlocutory in nature.

[1] Appellant takes no side in the battle royale between the State and the Fort Worth Court of Appeals concerning whether a trial court has an inherent power to enter an order nunc pro tunc during the period in which it retains plenary power. *See Williams*, 2018 WL 3468458 at *4; State's brief at 13-25. Appellant's point is that, assuming such an order is valid, it is not appealable on its own.

[2] It bears repeating that a defendant should be allowed to appeal the *substance* of a plenary stage nunc pro tunc order – as part of the general appeal of his conviction.

Accordingly, that brings us back to the general rule for appeals when a motion for new trial has been filed: a defendant has ninety days from the day sentence is imposed in open court to file a notice of appeal. TEX. R. APP. P. 26.2(a)(2). As the Fort Worth Court correctly found, Appellant's notice of appeal from the trial court's judgment was sufficient to invoke his appellate rights and the panel could therefore consider the merits of Appellant's complaints about the nunc pro tunc order.

The State's proposed rule gives no benefit and only leads to confusion:

Adopting the State's proposal to change the law and permit an appeal from an interlocutory nunc pro tunc order would create a disadvantageous anomaly in the law. It would entail an obligation to immediately appeal a nunc pro tunc order before entry of a final judgment – but would contradict the *Apolinar* framework in all other (exactly similar) cases in which a trial court renders an order before a final judgment.

The State is under the impression that a just-convicted defendant whose appeal is limited to challenging the substance of the nunc pro tunc has *functionally* appealed only that order. *See* State's brief at 26 n.6. But there is no authority supporting such a formulation and it is without any logical foundation. When a trial court modifies a judgment (either through a nunc pro tunc order or otherwise) *before* that judgment becomes final, any changes made will ultimately be subsumed within and become part of the final judgment. *See* CR 298 (ordering that nunc pro tunc

order be attached to final judgment). This final judgment is the one that a defendant will seek to appeal – just as Appellant has attempted to do in this case.

Under the State's apparent "two judgment, two appeals" theory, a defendant who files a motion for new trial must now file a notice of appeal within thirty days of the entry of a judgment nunc pro tunc, but is entitled (under appellate rule 26.2(a)(2)) to wait ninety days from the pronouncement of sentence to file a notice of appeal – *from the judgment itself*. Such a scheme is unworkable in practice, unfair in theory, and represents a departure from this Court's efforts to streamline and simplify the rules surrounding the filing of a notice of appeal.

Although a mundane concern, such a regime will call for two cause numbers and two concurrent appeals from what is – for all intents and purposes – the same cause of action. That will simply introduce more confusion and require litigants to begin drawing distinctions between the various notices of appeal: one for nunc pro tunc orders, one for the conviction. This represents a needless and silly complication. *See Canter v. Am. Ins. Co.*, 28 U.S. 307, 318 (1830) ("It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments upon successive appeals."); *see also* Elizabeth Lee Thompson, *Interlocutory Appeals in Texas: A History*, 48 St. Mary's

L.J. 65, 69 (2016) (the rule permitting only appeals from final judgments "promotes judicial efficiency [and] avoids piecemeal litigation").

Along with this confusion is an accompanying system that deprives an unknowing defendant of his right to appeal a judgment on the basis that a post-trial modification of that judgment injured his rights. It is conceivable that future defendants may not have appointed counsel when a nunc pro tunc judgment is entered. It will hardly be obvious to a *pro se* defendant – especially one who has filed a motion for new trial and will assume (apparently wrongly) that the Rules of Appellate Procedure actually apply – that he will waive his complaints as to the trial court's modification if he waits too long.

Placing an extra layer of procedural falderol on top of a defendant's appellate rights brings no advantage to the process and seeks only to lay a trap for the unwary. "A person's right to appeal a civil or criminal judgment should not depend upon traipsing through a maze of technicalities." *Harkcom v. State*, 484 S.W.3d 432, 434 (Tex. Crim. App. 2016). The system works fine the way it is – there is no need for the State's intrusive meddling into it.

CONCLUSION AND PRAYER

The State sought from the Fort Worth Court of Appeals the implementation of an unprecedented rule: the requirement that a defendant file a separate notice of appeal when he wishes to complain about a nunc pro tunc order that is handed down while a trial court retains plenary power. The Fort Worth Court correctly rejected this analysis. The new rule benefits no one and violates the well-established no-appeals-from-interlocutory-orders rule. This Court should similarly reject the State's entreaties.

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that this Court overrule the State's claims made in its brief and affirm the judgment of the Fort Worth Court of Appeals. Appellant additionally prays for such other and further relief to which he may be entitled.

Respectfully submitted,

/s/ Colin T. McLaughlin
COLIN T. MCLAUGHLIN
State Bar of Texas No. 24060892
6513 Colleyville Blvd, Suite 300
Colleyville, TX 76034
Tel: (817) 482-6263
Fax: (817) 329-7732
colintmclaughlin@gmail.com
Counsel for James E. Williams

CERTIFICATE OF SERVICE

I, Colin T. McLaughlin, certify that on April 19, 2019, a true copy of this brief has been served upon the following persons in the following manners:

Via e-mail
Joseph W. Spence
Assistant Criminal District Attorney

Via e-mail
Stacy Soule
State Prosecuting Attorney

/s/ Colin T. McLaughlin
COLIN T. MCLAUGHLIN

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Tex. R. App. 9.4 (i)(2) because it contains approximately 2,618 words, excluding the parts of the brief exempted by Tex. R. App. 9.4 (i)(l).
2. The electronic copy of this brief complies with Tex. R. App. 9.4 (i)(l) because it has been directly converted from Microsoft Word into a searchable document in Portable Document File (PDF) format.

/s/ Colin T. McLaughlin
COLIN T. MCLAUGHLIN